

SERVICE DATE – MARCH 15, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36168

OAKLAND GLOBAL RAIL ENTERPRISE—PETITION FOR DECLARATORY ORDER

Digest:¹ The Board concludes that Oakland Global Rail Enterprise, LLC (OGRE), does not require construction authority to rehabilitate a portion of the track identified in OGRE's petition located at the former Oakland Army Base in Oakland, Cal. However, the Board directs OGRE, Oakland Bulk and Oversized Terminal, and the City of Oakland to seek authority for the previous acquisitions of the track at issue or to explain why such authority is not required.

Decided: March 14, 2019

On May 23, 2018, Oakland Global Rail Enterprise, LLC (OGRE), filed a petition for a declaratory order asking the Board to find that OGRE does not need Board construction authority under 49 U.S.C. § 10901 to rehabilitate approximately 22,202 feet of track within an existing right-of-way at the former Oakland Army Base (Base) in Oakland, Cal. The Board concludes that construction authority under § 10901 is not required for OGRE to rehabilitate track that was authorized to be acquired in a 1943 Interstate Commerce Commission (ICC) decision as well as a spur to the west of that track. The Board does not address at this time whether authority is required to construct certain track at the east end of OGRE's proposed line that extends onto property owned by the Port of Oakland (the Port).² However, authority from the Board may be necessary for previous acquisitions of this track. Accordingly, the Board directs OGRE, its affiliate Oakland Bulk and Oversized Terminal (OBOT), and the City of Oakland (the City) to seek authority for the previous acquisitions of the track at issue or to explain why such authority is not required.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² It is the Board's understanding that OGRE is proposing to build this eastern segment of track at some point in the future. Accordingly, this decision refers to it as part of OGRE's "proposed line." However, as explained below, it is not clear whether OGRE's petition and related filings seek a determination from the Board regarding the need for construction authority with respect to this segment of line.

BACKGROUND

In its petition for declaratory order, OGRE states that the U.S. Army used the Base as a cargo port and warehousing center until it was closed in 1995. (OGRE Pet. 2.) According to OGRE, until the Base closed and for a short time thereafter, Oakland Terminal Railway (OTR)—a joint venture between Union Pacific Railroad (UP) and BNSF Railway Company—operated over the rail line serving the Base. (*Id.*) OGRE asserts that, in the years following closure of the Base, certain portions of the rail line were removed by the City and other portions fell into significant disrepair, but that the rail line was never formally abandoned. (*Id.*) OGRE states that in August 2006, approximately 170 acres of the Base were conveyed to the City and another 200 acres were conveyed to the Port. (*Id.*)

OGRE further states that the Port and the City are redeveloping the Base and that, as part of this redevelopment, OBOT, an affiliate of OGRE, has leased from the City the portions of the Base known as the West Gateway, which includes a portion of the existing railroad right-of-way. (*Id.*) OGRE says it intends to rehabilitate approximately 22,202 feet of track in the existing railroad right-of-way, which it has subleased from OBOT. (*Id.* at 3.) According to OGRE, this rehabilitated track, along with existing track in good condition within the Base, will constitute OGRE’s entire rail line. (*Id.*) OGRE indicates that its rail line would connect to the Port’s intermodal rail yard, which, in turn, connects to UP’s main line. (*Id.* at 3, Ex. 2.) OGRE states that it is rehabilitating Board-jurisdictional track within the existing rail right-of-way, and that no railroad line would be constructed outside that right-of-way. (*Id.* at 3, 4-5.) OGRE argues that under Board precedent, the rehabilitation, repair, replacement, or re-building of existing Board-jurisdictional track does not require Board authority. (*Id.* at 4-5.)

On June 29, 2018, the City filed a reply to OGRE’s petition. The City’s reply includes excerpts from OTR’s 1943 application to the ICC to acquire and operate the lines of railroad that OTR planned to use to serve the Base at that time (1943 OTR Application), as well as excerpts from Oakland Terminal Railroad Co. Purchase, Etc., FD 14115 et al. (ICC decided May 26, 1943), the ICC’s 1943 decision granting OTR authority to acquire and operate those lines (1943 Decision). Relying on these excerpts, the City argues that it is possible that portions of the track described in OGRE’s petition were historically operated as private track and, therefore, the City suggests that “OGRE’s ‘rehabilitation’” of that track could actually constitute construction of a new rail line that would require Board authority. (City Reply 7-8, June 29, 2018.)

On July 16, 2018, OGRE filed a reply to the City’s reply,³ arguing that the City’s reply offered nothing more than conjecture regarding the historical status of the track and that available evidence, including language in the 1943 OTR Application, indicates that any track in the West Gateway area was not private track. (OGRE Reply 4-7, July 16, 2018.) OGRE also states that the maps from the 1943 proceeding showed that “nearly all of the track OGRE intends to rehabilitate is track for which the ICC previously exercised jurisdiction,” even though the

³ While the Board’s regulations do not generally permit “replies to replies,” 49 C.F.R. § 1104.13(c), in the interest of having a more complete record, the Board will accept all of the surreplies filed in this proceeding.

1943 OTR Application maps did not show track extending as far west as OGRE's proposal. (Id. at 5.)

On August 1, 2018, the Board, through the Acting Director of the Office of Proceedings, issued a decision instituting a declaratory order proceeding and directing OGRE to provide additional information and clarify certain issues. OGRE filed its supplement responding to the Board's request for additional information on August 21, 2018. The supplement includes maps and construction plans depicting where the proposed rehabilitation would take place and a map depicting how OGRE's current proposal compares to the track depicted in the 1943 OTR Application. (OGRE Supplement, Exs. 1-4, Aug. 21, 2018.) These maps and plans show that OGRE's ultimate plans involve track that extends from the west end of the City's property on the Base eastward and then curves south, where it will connect with the Port's track, which connects with UP's main line. (See id. at Exs. 1, 4.) OGRE states that, although the 1943 OTR Application maps do not show track extending as far west as OGRE's proposed line, available evidence indicates that the rail line did extend this far and that the portion of OGRE's proposed rail line not depicted in the 1943 map was historically industrial track subject to Board jurisdiction. (OGRE Supplement 10-11, Aug. 21, 2018.)

With respect to the east end of the proposed rail line, OGRE provides some conflicting information. OGRE asserts that the track is all located on City property except for a small segment of what OGRE refers to as "West Gateway Lead No. 2" located at the east end of the proposed rehabilitated line, which is on property that OGRE states is owned by the Port. (Id. at 5-6, 7 n.13.) These statements appear consistent with the construction plans provided in drawing RR-10 of Exhibit 1 of OGRE's supplement. OGRE claims that the City has a rail easement, which OGRE suggests it has the authority to use, on this segment of track located on Port property. (Id. at 7 n.13.) In contrast, in its supplement, OGRE states that all of the track that OGRE proposes to rehabilitate is located on City property. (Id. at 7, 13.) In addition, at least one of the maps provided by OGRE in its supplement appears to indicate that the rehabilitation work would stop either at or close to the Port property line. (OGRE Supplement, Ex. 3, Aug. 21, 2018 (indicating that currently planned rehabilitation work would stop just before the track starts to curve south toward Port property).)⁴

⁴ Certain maps provided by OGRE depict additional track that continues south, beyond where the east end would connect to the Port's track, and then curves back to the west along East Burma Road. (OGRE Pet., Ex. 2 (showing track in orange extending beyond where the east end would connect to Port track); OGRE Supplement, Ex. 3, Aug. 21, 2018 (showing track in purple extending beyond where the east end would connect to Port track).) However, OGRE has made multiple representations—including in its August 21 filing in which it clarified its proposed rehabilitation—that this track is not part of its current plans. (OGRE Pet. 3, n.5 (stating that the rehabilitation work is limited to the track marked in dark green boxes in the map provided at Exhibit 2); OGRE Supplement, Exs. 3-4, Aug. 21, 2018 (showing that the track rehabilitation would stop at a point before the track curves south and then back to the west).) Accordingly, the Board will not address that additional section of track to the south and west of the east end in this decision.

On September 18, 2018, the City and the Port each filed replies to OGRE's August 21, 2018 supplement. The City's reply argues that the segment of track at the west end of the West Gateway that OGRE identified as not appearing in the 1943 map was likely private track and that this conclusion is supported by portions of OTR's 1943 Application and the corresponding 1943 Decision. (City Reply 2-4, Sept. 18, 2018.) The City also notes that it was unaware at the time it acquired the rail line that it may have been required to seek authority from the Board for the acquisition. (Id. at 5.)

The Port explains that it appears OGRE intends to connect to the interstate rail network through the Port's property, and argues that OGRE's proposed West Gateway Lead No. 2 track, which would connect with trackage in the Port's intermodal yard and marine terminal facility on Port property, is not within the right-of-way that was operated as part of OTR's common carrier operations authorized by the 1943 Decision. (Port Reply 9-12, 15, Sept. 18, 2018.) The Port asserts that the 1943 Decision granted authority to acquire and operate trackage that extended from the West Gateway area in an easterly direction to OTR's Yerba Buena Yard in downtown Emeryville, Cal. (Id. at 11-12.) The Port argues that, in contrast, OGRE's proposed track does not connect with the interstate rail system along this easterly 1943 OTR route, but rather that OGRE's proposed track curves south near the eastern edge of the Base (at the point where OTR's route continued north and east to its interstate rail connection) to connect to the Port's track, giving OGRE access to the interstate network in an entirely different location than OTR's line. (Id. at 12.) The Port states that, to the extent that track previously existed where OGRE's proposed line would curve south to connect to the Port's track, it was likely operated by the Army as spur or industrial track for moving property around the warehouses that existed on that portion of the Base. (Id. at 12-13.) According to the Port, while it is not entirely clear, it appears OGRE intends to connect its West Gateway Lead No. 2 track to the Port's track by constructing track on Port property that was not part of the track that OTR was authorized to acquire and operate in the 1943 Decision. (Id. at 10-12.)

The Port further asserts that it would be premature for the Board to grant OGRE's pending request for a declaratory order since OGRE has not yet obtained the property rights that it needs from the Port to build any track on Port property. (Id. at 13.) According to the Port, the easement over Port property that OGRE claimed the City possesses was in fact a temporary easement that has expired. (Id. at 7 n.6.) In addition, the Port argues that the Board should deny any future request from OGRE for authority to operate over any portion of the Port's property, because the Port currently has no intention of granting OGRE property and/or contract rights to operate over any part of its property. (Id. at 14-15.)

On September 27, 2018, OGRE filed a surreply to the September 18th replies of the City and the Port. OGRE argues that any questions regarding OGRE's rights to build on Port property or to operate on Port track are outside the scope of OGRE's pending petition for declaratory order. (OGRE Reply 3-4, Sept. 27, 2018.) OGRE further states that, because it is not filing for operating authority over any portion of track at this time and does not intend to do so until it has secured all necessary "operating rights," the Port's request that any application for operating authority be denied is premature. (Id. at 4.) In addition, OGRE notes that the section of track OGRE intends to replace or repair on Port property and connect to the Port's track was,

according to the Port, industrial track in 1943. (*Id.* at 5-6 (citing Port Reply 12-13, Sept. 18, 2018).) OGRE states that industrial track is subject to Board jurisdiction and may be rehabilitated without Board authority. (*Id.* at 6.)

On October 9, 2018, the Port filed a reply to OGRE's September 27, 2018 surreply. The Port argues that OGRE misinterpreted the evidence and the Port's previous statement regarding the portion of track on Port property that OGRE intends to reconstruct and/or rehabilitate. (Port Reply 2, Oct. 9, 2018.) The Port asserts that when it described the track on Port property as "industrial track," it was explaining that the track was industrial track used by the Army to move its own property—i.e., private track not subject to Board jurisdiction. (*Id.* at 2-3.)⁵

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or to remove uncertainty. The Board has broad discretion to determine whether to issue a declaratory order. See *Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Auth.—Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989). The Board finds that it is appropriate to resolve whether construction authority is required for OGRE to rehabilitate or replace a portion of its proposed line. In addition, this decision addresses the actions the City, OBOT, and OGRE must take to bring their previous acquisitions of this track into compliance with the Board's regulatory requirements.

Construction Authority

The Port has raised the threshold question of whether it would be appropriate for the Board to issue a declaratory order holding that OGRE does not need construction authority if OGRE has not obtained the necessary property rights to build any track on Port property and if the Port has no intention of granting such rights. (Port Reply 13, Sept. 18, 2018.) For the reasons explained below, the Board is not addressing at this time whether § 10901 authority is required for the rehabilitation or replacement of the segment of track at the east end of OGRE's proposed line that would extend onto Port property. Accordingly, the Port's concerns are moot. However, the Board finds that it is appropriate to issue a declaratory order determining whether Board construction authority is required for the rehabilitation or replacement of the remainder of OGRE's proposed line.

The considerations as to whether construction authority is required are not the same for OGRE's entire proposed line. The line can be appropriately considered in three segments, each segment raising distinct considerations. Therefore, the Board will consider OGRE's planned rail line in three segments. First, the segment at the west end of the City's property that is not depicted in the 1943 OTR Application maps will be referred to as the "West Segment." In the map OGRE provided at Exhibit 2 of its August 21, 2018 supplement, OGRE depicts the West Segment in white and labels it "[n]ot shown on 1943 map, but subject to agency jurisdiction."

⁵ On March 13, 2019, OGRE filed a letter from UP stating that UP supports OGRE's plan to restore rail service to the Base.

Second, the segment that begins at the eastern termination point of the West Segment and runs easterly to the point where the track, as depicted in the 1943 OTR Application, split in a “Y” formation, approximately where 26th Street intersected with 32nd Street in 1943, will be referred to as the “Middle Segment.”⁶ (See OGRE Supplement, Exs. 2-4, Aug. 21, 2018; City Reply, Ex. 2, June 29, 2018.)

Finally, the segment at the far east end of OGRE’s planned rail line will be referred to as the “East Segment.” The East Segment starts at the 1943 Y split and follows the part of the Y that curves south (instead of following the part that curves north and then east to connect with the interstate rail network outside the Base as OTR’s 1943 line did) to the point where it connects with the Port’s track, which would provide OGRE access to UP’s rail line. (Port Reply 9-12, App. 3, Sept. 18, 2018; OGRE Reply 5-6, Sept. 27, 2018; City Reply, Ex. 1 at 6, June 29, 2018.) As explained further below, the Board will not address whether § 10901 applies to the East Segment until OGRE clearly requests a decision on that issue and provides consistent evidence.

Middle Segment. The Board will begin its analysis with the largest segment—the Middle Segment. The Middle Segment was part of the rail line that OTR was authorized by the ICC to acquire and operate in 1943. (See OGRE Supplement, Ex. 2, Aug. 21, 2018 (map showing OTR rail line extending from the West Segment to the location where the East Segment begins at the split of the Y-shaped track).) None of the parties dispute that the Middle Segment was authorized for operation as jurisdictional track in 1943 and has not been abandoned. (City Reply 2-4, Sept. 18, 2018 (arguing only that the West Segment was not authorized in the 1943 Decision); Port Reply 9 & n.11, 12, Sept. 18, 2018 (arguing that any track on Port property was not part of the line approved in the 1943 Decision, but stating that it takes no position with respect to any track located on City property).) Under Board precedent, existing jurisdictional track may be rehabilitated or replaced without construction authority from the Board. See Jersey Marine Rail, LLC—Pet. for Declaratory Order, FD 36063, slip op. at 5 (STB served Jan. 31, 2017) (holding that a noncarrier could rehabilitate existing Board-jurisdictional track without construction authority, but that operating authority would be required to operate over the tracks); Mo. Cent. R.R.—Acquis. & Operation Exemption—Lines of Union Pac. R.R., FD 33508 et al., slip op. at 8 (STB served Sept. 14, 1999) (holding that a new owner of a rail line that has not been abandoned may repair, replace, rehabilitate, or rebuild the line without Board authority). Accordingly, no authority is required for OGRE to rehabilitate or replace the Middle Segment.

However, the Board notes that there does not currently appear to be an existing physical connection between the interstate rail network and the Middle Segment. (Port Reply 10, Sept. 18, 2018 (stating that OGRE’s proposed connection with the Port’s track would provide its only connection with the interstate rail network).) Because the Middle Segment is track subject

⁶ In 1943, at the Y split, the jurisdictional track being acquired by OTR continued to the north and east, where it connected to the interstate rail system outside the Base, while the other side of the Y split was a separate section of track not subject to the 1943 Decision that curved south, appearing to stay (and terminate) on the Base. (See City Reply, Ex. 1 at 6, June 29, 2018.)

to Board jurisdiction, a connection to the interstate system must be established if one no longer exists. Cf. Abe Fairmont, LLC—Aban. Exemption—in Fillmore Cty., Neb., AB 1106X et al., slip op. at 3 (STB served Aug. 17, 2017) (“[I]t is well settled that where there is a common carrier obligation attached to a segment of track, the Board will not allow that segment to become isolated from the rail system as a result of the abandonment of an adjoining segment.”). It is the Board’s understanding that OGRE ultimately intends to access the interstate system via the East Segment, which would connect the Middle Segment with the Port’s track, which connects to UP’s main line.

West Segment. OGRE argues that the West Segment was previously operated as jurisdictional track and, in support, points to language in the 1943 OTR Application stating that the City “constructed certain docks and tracks along the waterfront” and that OTR “constructed tracks connecting its lines along the northerly side of the [Outer Harbor District]”⁷ with the City’s track. (OGRE Supplement 10, Aug. 21, 2018.) OGRE also claims its position is supported by language in the OTR application indicating that export and import business occurred in the Outer Harbor District and by the fact that the Port leased the West Gateway area from the Army in 1999 to conduct its shipping activities. (Id.)

In response, the City claims that its research regarding the status of the track was inconclusive, but it nevertheless believes that there is support for categorizing some of the track at the west end of OGRE’s proposed line as private track. (City Reply 3, Sept. 18, 2018.) The City points to statements in the 1943 Decision regarding service to private shippers in the Outer Harbor District, which, according to the City, suggests that individual shippers, and not OTR or another railroad, owned and controlled the industrial track in the West Gateway area. The City also claims that the track identified by OGRE at the west end of its proposed line as track not identified on the 1943 map “appears to start at or around the border of the lot boundary for the West Gateway property.” (Id.) According to the City, this correlation suggests that the line depicted in the 1943 maps stopped where it did because the trackage beyond that point was privately controlled and operated. (Id. at 4.)

The Board agrees that the evidence on the record regarding the West Segment does not establish that the track is jurisdictional as OGRE claims. The facts relied on by OGRE merely establish that there was track in the area near where the West Segment will be located and that this track was used for some type of rail service to shippers. These facts do not demonstrate that the tracks extended as far west as the western end of the West Segment or, if they did, that all of the section of track not depicted in the 1943 maps was jurisdictional track. However, it is not necessary to determine the historical jurisdictional status of the West Segment to determine whether the track now requires authority under § 10901. For the reasons discussed below, the Board concludes that the West Segment now would be § 10906 excepted spur track, for which construction authority is not required.

⁷ The Outer Harbor District is defined geographically as comprising “an area about 1-mile square bounded on the west by the waters of San Francisco Bay, on the north by the main easterly approach to the [B]ay [B]ridge, and on the east and south by tracks of the Southern Pacific.” (City Reply, Ex. 3 at 3, June 29, 2018.)

Section 10906 excepts from Board regulation “spur, industrial, team, switching, [and] side tracks.” These categories of excepted tracks—referred to collectively in this decision as “spur” track—are not defined in the statute, nor does the legislative history of the Interstate Commerce Act reveal a clear Congressional intent regarding the meaning of these terms. Bhd. of Locomotive Eng’rs v. United States, 101 F.3d 718, 726 (D.C. Cir. 1996); N.Y.C. Econ. Dev. Corp.—Pet. for Declaratory Order, FD 34429, slip op. at 5 (STB served July 15, 2004). In assessing whether a particular track is rail line subject to the Board’s licensing authority or excepted track under § 10906, the Board has adopted a case-by-case approach that analyzes the track’s intended use, physical characteristics, and relationship to the rail system.⁸ Tri-City R.R.—Pet. for Declaratory Order, FD 36037, slip op. at 4 (STB served June 1, 2017).

Depending on the facts of the case, the Board’s analysis of whether track requires § 10901 authority or is excepted under § 10906 is informed by various indicia. With respect to “intended use,” the Board has considered whether the track will be used for certain ancillary operations (e.g., switching, loading, and unloading); whether it serves more than one shipper; whether the shipper is located at the end of the track; whether there are stations on the track; whether there is regularly scheduled service; who owns and maintains the track; and the volume of traffic moving over the track. With respect to physical characteristics the Board has considered the length of the track; whether it is stub-ended; and whether the track was constructed with light-weight rail. With respect to relationship to the rail system the Board typically has considered whether the track was built to penetrate new markets or territory. See, e.g., id. at 4-5. The Board considers and weighs the various indicia as appropriate in light of the particular evidence and circumstances of each case. Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760, slip op. at 15 (STB served Jan. 31, 2018) (“In determining whether a track is spur track, the Board uses a “case-by-case approach” and “weighs the various indicia as appropriate in light of the particular history and circumstances of each case.”); cf. Norfolk S. Ry.—Pet. for Exemption—in Balt. City & Balt. Cty., Md., AB 290 (Sub-No. 311X), slip op. at 10 (STB served Jan. 27, 2012) (discussing the Board’s discretion in weighing evidence submitted by the parties). Given the typical connection between the track’s relationship to the rail system, its physical characteristics, and its intended use, the various indicia generally relate to one another, and evidence regarding some indicia may be sufficient for the Board to make a determination on the overall legal status of the track without evidence to analyze all potential indicia.

As noted above, when the Board considers a line’s relationship to the rail system, the Board typically looks at whether the tracks were built to extend into a new market, which would be indicative of a § 10901 line. See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.,

⁸ The history of the track and other factors may also play a role in the Board’s determination. See, e.g., Union Pac. R.R.—Operation Exemption—in Yolo Cty., Cal., FD 34252, slip op. at 4 (STB served Dec. 5, 2002); ParkSierra Corp.—Lease & Operation Exemption—S. Pac. Transp. Co., FD 34126 et al., slip op. at 5 (STB served Dec. 26, 2001). In the present case, the history of the track is unclear but the other facts on the record are sufficient to conclude that the West Segment would be spur track, as discussed below.

FD 32760, slip op. at 15 (STB served Jan. 31, 2018); JGB Props. LLC—Pet. for Declaratory Order, FD 35817, slip op. at 8 (STB served Dec. 10, 2015); see also Tex. & Pac. Ry. v. Gulf, Colo. & S.F. Ry., 270 U.S. 266, 278 (1926). Importantly, in this case, the West Segment would not extend into new territory not previously served by the existing line or into territory served by another railroad. In the 1943 Decision, the ICC granted authority to OTR to provide service to the shippers west of the Middle Segment. (See OGRE Supplement, Ex. 2, Aug. 21, 2018.) The West Segment would merely allow OGRE to provide service to potential future shippers in that area historically served by the OTR line and where no other railroad provides service. Thus, the West Segment does not penetrate a new market or territory. See Tri-City R.R., FD 36037, slip op. at 4-5 (almost two-mile track built off a mainline to reach a new industrial park in Richland, Wash., did not extend into a new territory because the mainline had served the Richland area for decades); N.Y.C. Econ. Dev. Corp., FD 34429, slip op. at 5-6 (addition of slightly more than a mile to the end of existing track to reach a new transload facility and one other potential shipper did not penetrate new market because the geographic area had been historically served by the railroad in question and because the additional track facilitated but was not a prerequisite to serving the area).

The track's physical characteristics also support a finding that the West Segment is spur track. Specifically, the track would be short⁹ and stub-ended, which "are classic indicia of excepted track." Tri-City R.R., FD 36037, slip op. at 4-5; JGB Props. LLC, FD 35817, slip op. at 8.

With respect to the track's intended use, the record does not clearly establish whether the West Segment was or will be used for ancillary operations such as loading, unloading, storage, or switching. However, given that the track is stub-ended, and OGRE intends to serve a rail-to-ship terminal nearby, (OGRE Pet. 3), the West Segment may well be used for some of these activities. Moreover, while it is unclear how many shippers may ultimately be served by the West Segment, such track may still be spur track even if it connects multiple shippers to the main line. Tri-City R.R., FD 36037, slip op. at 4-5.

The Board finds that the indicia discussed above are sufficient to conclude that construction of the West Segment by OGRE would be construction of spur track excepted from Board regulation under § 10906. See, e.g., Tex. & Pac. Ry., 270 U.S. at 278; Tri-City R.R., FD 36037, slip op. at 4-5 (almost two-mile track not used for loading, storage, or switching and built off a mainline to reach a new industrial park with 13 shippers, found to be spur because it did not extend into a new market; was short and stub-ended; had no mileposts; and there was no evidence of any stations); Ind. R.R.—Pet. for Declaratory Order, FD 35181, slip op. at 2 (STB served Apr. 15, 2009) (five-mile track constructed to reach a new coal mine found to be spur because the rail line was intended to improve the facilities required by the mine and would not

⁹ Although the exact length of the West Segment is not clear, the maps provided at Exhibit 2 of OGRE's August 21, 2018 response indicate that the West Segment represents substantially less than half the approximately 22,000 feet of track that OGRE plans to build, which is indicative of spur. See, e.g., Tri-City R.R., FD 36037, slip op. at 5 (finding that the length of the track was indicative of spur because it was "less than two miles in length").

invade new territory); N.Y.C. Econ. Dev. Corp., FD 34429, slip op. at 5-7 (concluding that the track at issue was not a line of railroad because it did not extend into new markets and finding this conclusion supported by the fact that the track would be used for switching, would be short and stub-ended, and would be owned and maintained by the shipper, and that service would be provided as needed).

East Segment. As noted above, OGRE has provided conflicting information regarding the East Segment. Due to this conflicting information, it is not clear whether OGRE is asking the Board to determine whether rehabilitation or replacement of the East Segment—either in its entirety or some portion of it—requires Board construction authority. In addition, the Board finds that the evidence on the record is insufficient to determine whether the East Segment is jurisdictional track. Therefore, the Board will not address in this decision whether rehabilitation or replacement of the East Segment requires Board authority. Should OGRE wish the Board to issue a decision regarding the East Segment, OGRE may file a clear request for such relief.

To establish that construction authority is not necessary for the East Segment, OGRE could take various approaches, including providing additional evidence sufficient to support the conclusion that the East Segment was jurisdictional track and therefore can be rehabilitated or replaced without authority, or showing that construction of the East Segment is not covered by § 10901 because, for example, it constitutes a relocation of connecting tracks or construction of new connecting tracks without invading new territory. See, e.g., City of Detroit v. Canadian Nat'l Ry., 9 I.C.C.2d 1208, 1219 (1993), aff'd sub nom. Detroit/Wayne Cty. Port Auth. v. ICC, 59 F.3d 1314 (D.C. Cir. 1995) (holding that relocation of a rail tunnel did not require agency authority because the new tunnel did not invade new territory); Port Auth. of N.Y. & N.J.—Pet. for Declaratory Order, FD 34428, slip op. at 5 (STB served Jan. 21, 2004) (holding that the construction of new connecting tracks did not require Board authority because it made previously authorized service more efficient rather than penetrating new markets).

Authority Required Before Proposed Operations Can Begin

At least part of the line at issue is railroad line subject to Board licensing authority under 49 U.S.C. § 10901 for any acquisition, whether by purchase or by lease. 49 U.S.C. § 10901(a)(4) (stating that Board authority is required for a “a person other than a rail carrier [to] acquire a railroad line . . .”); Class Exemption—Acquis. & Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 810 n.1 (1985) (explaining that under 49 U.S.C. § 10901, the terms “acquire” and “operate” include interests in railroad lines of a lesser extent than fee simple ownership, such as a lease or a right to operate). In the present case, it appears there have been three acquisitions requiring Board authority for which no Board authority has been sought or granted. Specifically, the City acquired a portion of the OTR jurisdictional line; OBOT acquired that rail line from the City by lease; and OGRE then acquired the rail line from OBOT via a sublease. (OGRE Pet. 2-3.) Therefore, the Board will direct the City, OBOT, and OGRE to seek acquisition authority under § 10901 within 60 days of service of this decision or to explain to the Board why acquisition authority is not required.

In addition, the entity that will be operating the line must have Board authority to do so. 49 U.S.C. § 10901 (requiring authority to acquire or operate a rail line).¹⁰ Based on the record, it appears that OGRE intends to operate the line and that OGRE understands it must obtain operating authority to do so. (OGRE Pet. 5 n.16.) If so, OGRE's future request for acquisition authority should be styled as a request to acquire and operate the rail line.¹¹ However, if OGRE ultimately decides to have a different entity operate the line, OGRE should so indicate when it seeks acquisition authority, and that other entity must separately seek operating authority from the Board under § 10901.¹²

For the reasons discussed above, the petition for declaratory order will be granted.

It is ordered:

1. The petition for declaratory order is granted as explained above.
2. The City, OGRE, and OBOT are directed to seek acquisition authority under 49 U.S.C. § 10901 for the prior acquisitions of the rail line by May 14, 2019, or to explain to the Board why such authority is not required.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

¹⁰ Under the Board's environmental rules at 49 C.F.R. § 1105.6(b)(4)(i), an acquisition, lease or operation under 49 U.S.C. § 10901 normally requires preparation of an Environmental Assessment if operational changes exceed any of the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5). Here, the applicable threshold would be an increase in rail traffic of three or more trains per day on any segment of rail line. 49 C.F.R. § 1105.7(e)(5)(ii).

¹¹ Even if not so styled, however, a grant of acquisition authority to OGRE would impose a common carrier obligation to provide service upon reasonable request. See, e.g., Groome & Assoc., Inc. v. Greenville Cty. Econ. Dev. Corp., NOR 42087, slip op. at 10 (STB served July 27, 2005).

¹² The Port argues that the Board should deny any future request from OGRE for operating authority over any tracks located on Port property because OGRE does not and will not have the property and/or contract rights necessary to operate on any of the Port's track. (Port Reply 14-15, Sept. 18, 2018.) Because OGRE is not seeking operating authority here, this issue is outside the scope of the current petition. The Board notes, however, that because a grant of operating authority is permissive, the lack of the necessary contractual and property rights would not necessarily foreclose a grant of operating authority. Ohio River Partners LLC—Acquis. & Operation Exemption—Hannibal Dev., LLC, FD 35984, slip op. at 3 (STB served Apr. 1, 2016); see also Lackawanna, FD 33905 et al., slip op. at 6. Of course, if the Board were to grant operating authority in the future, OGRE would need to obtain the necessary property or contract rights in order to exercise that authority. See Lackawanna, FD 33905 et al., slip op. at 6; Gen. Ry., FD 34867, slip op. at 4.